

AMENDED IN ASSEMBLY MAY 3, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

**ASSEMBLY BILL**

**No. 928**

**Introduced by Assembly Member Jerome Horton**

February 18, 2005

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An act to amend Section ~~1717 of the Civil Code~~ *1033.5 of the Code of Civil Procedure*, relating to attorney's fees.

LEGISLATIVE COUNSEL'S DIGEST

AB 928, as amended, Jerome Horton. Attorney's fees.

Existing law provides, in any action on a contract, where the contract specifically provides ~~that for recovery of attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party~~, that the prevailing party on the contract, whether he or she is the party specified in the contract or not, is entitled to reasonable attorney's fees, as fixed by the court, in addition to other costs. ~~Existing law also provides, in any action on a contract based on a book account that does not provide for attorney's fees and costs, that the prevailing party on the contract is entitled to reasonable attorney's fees, as fixed by the court according to a specified formula, in addition to other costs. Those attorney's fees are limited to the lesser of the maximum amount under that formula, the amount provided by any default attorney's fee schedule adopted by the court, or an amount otherwise provided by the court, as specified.~~

This bill would provide that ~~in no event shall the attorney's fees awarded pursuant to the former provision be less than the fees that would have been awarded had the fees been calculated pursuant to the latter provision~~, *for an action on a contract subject to this provision, if a court has established a schedule of attorney's fees, the prevailing*

*party in a collection action shall be awarded attorney's fees in an amount that shall be equal to 25% of the first \$4,000 of the principal obligation owing under the contract, when the debtor is a business entity.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 1033.5 of the Code of Civil Procedure is  
2     amended to read:  
3     1033.5. (a) The following items are allowable as costs under  
4     Section 1032:  
5         (1) Filing, motion, and jury fees.  
6         (2) Juror food and lodging while they are kept together during  
7     trial and after the jury retires for deliberation.  
8         (3) Taking, videotaping, and transcribing necessary  
9     depositions including an original and one copy of those taken by  
10    the claimant and one copy of depositions taken by the party  
11    against whom costs are allowed, and travel expenses to attend  
12    depositions.  
13         (4) Service of process by a public officer, registered process  
14    server, or other means, as follows:  
15             (A) When service is by a public officer, the recoverable cost is  
16    the fee authorized by law at the time of service.  
17             (B) If service is by a process server registered pursuant to  
18    Chapter 16 (commencing with Section 22350) of Division 8 of  
19    the Business and Professions Code, the recoverable cost is the  
20    amount actually incurred in effecting service, including, but not  
21    limited to, a stakeout or other means employed in locating the  
22    person to be served, unless such charges are successfully  
23    challenged by a party to the action.  
24             (C) When service is by publication, the recoverable cost is the  
25    sum actually incurred in effecting service.  
26             (D) When service is by a means other than that set forth in  
27    subparagraph (A), (B) or (C), the recoverable cost is the lesser of  
28    the sum actually incurred, or the amount allowed to a public  
29    officer in this state for such service, except that the court may  
30    allow the sum actually incurred in effecting service upon  
31    application pursuant to paragraph (4) of subdivision (c).

- 1 (5) Expenses of attachment including keeper's fees.
- 2 (6) Premiums on necessary surety bonds.
- 3 (7) Ordinary witness fees pursuant to Section 68093 of the
- 4 Government Code.
- 5 (8) Fees of expert witnesses ordered by the court.
- 6 (9) Transcripts of court proceedings ordered by the court.
- 7 (10) Attorney fees, when authorized by any of the following:
- 8 (A) Contract.
- 9 (B) Statute.
- 10 (C) Law.
- 11 (11) Court reporters fees as established by statute.
- 12 (12) Models and blowups of exhibits and photocopies of
- 13 exhibits may be allowed if they were reasonably helpful to aid
- 14 the trier of fact.
- 15 (13) Any other item that is required to be awarded to the
- 16 prevailing party pursuant to statute as an incident to prevailing in
- 17 the action at trial or on appeal.
- 18 (b) The following items are not allowable as costs, except
- 19 when expressly authorized by law:
- 20 (1) Fees of experts not ordered by the court.
- 21 (2) Investigation expenses in preparing the case for trial.
- 22 (3) Postage, telephone, and photocopying charges, except for
- 23 exhibits.
- 24 (4) Costs in investigation of jurors or in preparation for voir
- 25 dire.
- 26 (5) Transcripts of court proceedings not ordered by the court.
- 27 (c) Any award of costs shall be subject to the following:
- 28 (1) Costs are allowable if incurred, whether or not paid.
- 29 (2) Allowable costs shall be reasonably necessary to the
- 30 conduct of the litigation rather than merely convenient or
- 31 beneficial to its preparation.
- 32 (3) Allowable costs shall be reasonable in amount.
- 33 (4) Items not mentioned in this section and items assessed
- 34 upon application may be allowed or denied in the court's
- 35 discretion.
- 36 (5) When any statute of this state refers to the award of "costs
- 37 and attorney's fees," attorney's fees are an item and component
- 38 of the costs to be awarded and are allowable as costs pursuant to
- 39 subparagraph (B) of paragraph (10) of subdivision (a). Any claim
- 40 not based upon the court's established schedule of attorney's fees

1 for actions on a contract shall bear the burden of proof.  
2 Attorney's fees allowable as costs pursuant to subparagraph (B)  
3 of paragraph (10) of subdivision (a) may be fixed as follows: (A)  
4 upon a noticed motion, (B) at the time a statement of decision is  
5 rendered, (C) upon application supported by affidavit made  
6 concurrently with a claim for other costs, or (D) upon entry of  
7 default judgment. *For an action on a contract subject to Section*  
8 *1717 of the Civil Code, if a court has established a schedule of*  
9 *attorney's fees, the prevailing party in a collection action shall*  
10 *be awarded attorney's fees in an amount that shall be equal to 25*  
11 *percent of the first four thousand dollars (\$4,000) of the*  
12 *principal obligation owing under the contract, when the debtor is*  
13 *a business entity.* Attorney's fees allowable as costs pursuant to  
14 subparagraph (A) or (C) of paragraph (10) of subdivision (a)  
15 shall be fixed either upon a noticed motion or upon entry of a  
16 default judgment, unless otherwise provided by stipulation of the  
17 parties.

18 Attorney's fees awarded pursuant to Section 1717 of the Civil  
19 Code are allowable costs under Section 1032 as authorized by  
20 subparagraph (A) of paragraph (10) of subdivision (a).

21 ~~SECTION 1. Section 1717 of the Civil Code is amended to~~  
22 ~~read:~~

23 ~~1717. (a) In any action on a contract, where the contract~~  
24 ~~specifically provides that attorney's fees and costs, which are~~  
25 ~~incurred to enforce that contract, shall be awarded either to one~~  
26 ~~of the parties or to the prevailing party, then the party who is~~  
27 ~~determined to be the party prevailing on the contract, whether he~~  
28 ~~or she is the party specified in the contract or not, shall be~~  
29 ~~entitled to reasonable attorney's fees in addition to other costs.~~

30 ~~Where a contract provides for attorney's fees, as set forth~~  
31 ~~above, that provision shall be construed as applying to the entire~~  
32 ~~contract, unless each party was represented by counsel in the~~  
33 ~~negotiation and execution of the contract, and the fact of that~~  
34 ~~representation is specified in the contract.~~

35 ~~Reasonable attorney's fees shall be fixed by the court, and shall~~  
36 ~~be an element of the costs of suit. However, in no event shall the~~  
37 ~~attorney's fees awarded be less than the fees that would have~~  
38 ~~been awarded had the fees been calculated pursuant to~~  
39 ~~subdivision (a) of Section 1717.5.~~

1 Attorney's fees provided for by this section shall not be subject  
2 to waiver by the parties to any contract which is entered into after  
3 the effective date of this section. Any provision in any such  
4 contract which provides for a waiver of attorney's fees is void.

5 (b) (1) The court, upon notice and motion by a party, shall  
6 determine who is the party prevailing on the contract for  
7 purposes of this section, whether or not the suit proceeds to final  
8 judgment. Except as provided in paragraph (2), the party  
9 prevailing on the contract shall be the party who recovered a  
10 greater relief in the action on the contract. The court may also  
11 determine that there is no party prevailing on the contract for  
12 purposes of this section.

13 (2) Where an action has been voluntarily dismissed or  
14 dismissed pursuant to a settlement of the case, there shall be no  
15 prevailing party for purposes of this section.

16 Where the defendant alleges in his or her answer that he or she  
17 tendered to the plaintiff the full amount to which he or she was  
18 entitled, and thereupon deposits in court for the plaintiff, the  
19 amount so tendered, and the allegation is found to be true, then  
20 the defendant is deemed to be a party prevailing on the contract  
21 within the meaning of this section.

22 Where a deposit has been made pursuant to this section, the  
23 court shall, on the application of any party to the action, order the  
24 deposit to be invested in an insured, interest-bearing account.  
25 Interest on the amount shall be allocated to the parties in the  
26 same proportion as the original funds are allocated.

27 (c) In an action which seeks relief in addition to that based on  
28 a contract, if the party prevailing on the contract has damages  
29 awarded against it on causes of action not on the contract, the  
30 amounts awarded to the party prevailing on the contract under  
31 this section shall be deducted from any damages awarded in  
32 favor of the party who did not prevail on the contract. If the  
33 amount awarded under this section exceeds the amount of  
34 damages awarded the party not prevailing on the contract, the net  
35 amount shall be awarded the party prevailing on the contract and  
36 judgment may be entered in favor of the party prevailing on the  
37 contract for that net amount.